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No. 96-1037

In the Supreme Court of the United States

OCTOBER TERM, 1996

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGIES, INC.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the sovereign immunity from suit accorded to Indian Tribes as a matter of federal law bars an action brought in state court to recover money damages for a breach of contract arising out of commercial activity undertaken by a Tribe outside Indian country.

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INTEREST OF THE UNITED STATES

The United States' interest in this case arises primarily from the national government's special relationship with the Indian Tribes. Continued recognition of tribal sovereign immunity from suit is an important part of the protection that federal law affords to tribal sovereignty, and it furthers Congress's policy of encouraging tribal self-determination and economic development. The United States also has an interest in ensuring the observance of federal supremacy in all matters relating to the Tribes. At the Court's invitation, the Acting Solicitor General filed a brief in this case at the petition stage expressing the views of the United States.

STATEMENT

1. The United States entered into its first treaty with the Kiowa Nation of Indians in 1837. 7 Stat. 533. Later treaties with the Kiowa were concluded in 1853 (10 Stat. 1013), 1865 (14 Stat. 717), and 1867 (15 Stat. 581, 589). Those treaties effectively recognized the Kiowa as a "domestic dependent nation" and established a relationship of trust and protection between the Tribe and the United States. See generally *Cherokee Nation* v. *Georgia*, 30 U.S. (15 Pet.) 1, 17 (1831). The United States continues to recognize the tribal government, now formally organized under the Oklahoma Indian Welfare Act, 25 U.S.C. 503, as having "the immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 61 Fed. Reg. 58,211, 58,213 (1996) (quoting 25 C.F.R. 83.2); see also 25 U.S.C. 479a, 479a-1.[1]

In their 1867 treaties, 15 Stat. 581, 589, the Kiowa, Comanche and Apache Tribes retained, from their original tribal lands, well over 2,000,000 acres as a permanent reservation. See *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903) (describing history). Through later shifts in law and policy, however, the United States divested the Kiowa of the majority of the reserved lands, in exchange for allotments of land to individual members of the Tribe and cash compensation to be held in trust for the Tribe by the United States. *Ibid.* We are informed that the Tribe today retains some 1,200 acres of land in Oklahoma, much of it in scattered parcels, as well as an interest in approximately

[1] We are informed that the Tribe presently has approximately 11,000 enrolled members, of whom a smaller number are actively involved in tribal affairs.

3,000 acres of land held by the United States in trust for the Kiowa, Comanche and Apache Tribes.

2. The record in this case is sparse. It appears that a tribal entity entered into a letter agreement dated March 19, 1990, in which it agreed to purchase stock then held by respondent in an Oklahoma corporation known as Clinton-Sherman Aviation, Inc. (CSA). See Pet. App. 2; J.A. 9, 49-50. On April 3, 1990, the then-Chairman of the Tribe's Business Committee signed, in the name of the Tribe, a short-term promissory note (the Note) promising to pay respondent $285,000, with interest at an annual rate of 10% in the ordinary course and 15% after any default. J.A. 11-14, 67, 77-78.

The face of the Note indicates that it was signed at Carnegie, Oklahoma, where the Tribe maintains a Tribal Complex on land held in trust for the Tribe by the United States. J.A. 11, 14; see J.A. 16. Respondent's petition seeking enforcement of the Note alleges (J.A. 10), however, that the Note was "executed and delivered to [respondent] in Oklahoma City," and petitioner has not contested that allegation. Unless otherwise directed, payments were to be made at respondent's offices in Oklahoma City. J.A. 11. The Note fails to specify a governing law, but in a paragraph entitled "Waivers and Governing Law" it provides: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." J.A. 14.

The Note called for only two payments, to be made 30 and 90 days after the Note was signed. J.A. 11. The Tribe did not make either payment. J.A. 78. It further appears, from the decision in a related case, that a similar financial undertaking given by the Tribe in connection with the acquisition of additional shares of CSA was secured by the acquired shares, which subsequently proved to be worthless. Pet. App. 3; *Hoover* v. *Kiowa Tribe of Oklahoma*, 909 P.2d 59, 60 & n.3 (Okla. 1995), cert. denied, 116

S. Ct. 1675 (1996); see also *Aircraft Equip. Co.* v. *Kiowa Tribe of Oklahoma*, 921 P.2d 359, 360 & n.1 (Okla. 1996) (default on promissory note assumed in related transaction).

3. Three years after payment was due, respondent sued the Tribe in state court seeking judgment on the Note. Pet. App. 2; J.A. 1 (petition filed Aug. 24, 1993). The Tribe moved to dismiss for lack of jurisdiction, in part on the ground that the Tribe had never waived its sovereign immunity from suit, and therefore could not be sued for money damages. See Pet. App. 2; J.A. 15. The court denied that motion (J.A. 48), and the Tribe answered, again asserting its immunity from suit (J.A. 50). The court granted respondent's motion for summary judgment, awarding respondent a total of $445,471 in principal and accrued interest, together with attorneys' fees and costs. J.A. 77-79.

The Oklahoma Court of Appeals affirmed (Pet. App. 1-4), and the Oklahoma Supreme Court declined discretionary review (see Pet. 2). The court of appeals rejected the Tribe's sovereign immunity argument in this case on the authority of *Hoover* v. *Kiowa Tribe of Oklahoma*, which arose out of the same transaction and involved essentially the same facts. In *Hoover*, the Oklahoma Supreme Court referred to its earlier decision in *Lewis* v. *Sac & Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (1994), cert. denied, 116 S. Ct. 476 (1995), which held (*id.* at 507-512) that the Oklahoma courts are generally empowered to decide civil cases arising within their territorial jurisdiction, whether those cases are governed by federal or state law. Although *Lewis* recognized that a special jurisdictional inquiry was appropriate "whenever Indian interests are tendered in a controversy," it held that "[o]nly that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-

government stands outside the boundaries of permissible state-court cognizance." *Id.* at 508.

Lewis did not address the question of sovereign immunity. 896 P.2d at 506 n.15, 511 & n.59; *Hoover*, 909 P.2d at 61. In ruling on that issue, *Hoover* cited approvingly the New Mexico Supreme Court's decision in *Padilla* v. *Pueblo of Acoma*, 754 P.2d 845 (1988), cert. denied, 490 U.S. 1029 (1989), which held that a New Mexico court could decide a claim brought against a Tribe by a private party alleging a breach of contract in connection with off-reservation commercial activity undertaken by the Tribe. *Hoover* adopted *Padilla*'s reasoning that a forum State's decision to recognize a Tribe's sovereign immunity from suit on claims arising within the state courts' usual territorial and subject-matter jurisdiction was no different from the forum State's decision to accord another State immunity from claims arising out of activities undertaken within the forum State. *Hoover*, 909 P.2d at 62; see *Padilla*, 754 P.2d at 850-851. Citing this Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), *Padilla* held (754 P.2d at 850) that the decision was "solely a matter of comity." Because Oklahoma, like New Mexico, allows its courts to entertain suits against itself for breach of contract, *Hoover* concluded (909 P.2d at 62) that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." Despite an acknowledged conflict with the Tenth Circuit's decision in *Sac & Fox Nation* v. *Hanson*, 47 F.3d 1061, cert. denied, 116 S. Ct. 57 (1995), the Oklahoma Supreme Court has subsequently reaffirmed *Hoover*'s holding in *First National Bank in Altus* v. *Kiowa, Comanche & Apache Intertribal Land Use Committee*, 913 P.2d 299, 301 (1996); *Aircraft Equipment Co.* v. *Kiowa Tribe of Oklahoma*, 921 P.2d 359 (1996); and *Aircraft Equipment Co.* v. *Kiowa Tribe of Oklahoma*,

939 P.2d 1143, 1145-1148 (1997) (also upholding a judgment creditor's right to use against a Tribe the remedies ordinarily available in state court, including seizure of tribal tax revenues), petition for cert. pending, No. 97-216 (filed July 30, 1997).

SUMMARY OF ARGUMENT

The Oklahoma courts have asserted jurisdiction to hear and determine a suit for money damages brought directly against a federally recognized Indian Tribe. In the absence of consent by the Tribe or authorization by Congress, federal law forbids that exercise of state judicial power.

The Indian Tribes are a continuation of self-governing political communities whose original sovereignty predates that of the States. The question of who should represent this Nation in dealing with the Tribes was finally resolved by the adoption of the Constitution, which committed the field of Indian relations exclusively to the national government. The ensuing 200 years of negotiation, armed conflict, territorial consolidation, and successive federal policies have shaped for the Tribes a unique place in the Nation's political and legal history, as separate sovereigns under the dominant sovereignty and protection of the United States. The same history teaches that, while tribal sovereignty predates the Constitution, it is now federal law that both protects that sovereignty and defines its limits.

As this Court has long recognized and recently reaffirmed, sovereign immunity bars any suit against a Tribe for money damages in the absence of the Tribe's consent or congressional abrogation of the Tribe's immunity. The Court's cases make clear that a Tribe's immunity extends to suits based on tribal dealings with nonmembers, and to suits based on conduct that occurred outside Indian country. Because the Constitution vests

power over Indian affairs in the national government, and because both the States and the Tribes are therefore subject to a comprehensive body of federal law regulating those affairs, the States are not free to choose, as a matter of sovereign comity, whether or not to honor the tribal immunity recognized by this Court's cases. The scope afforded that immunity is a matter of supervening federal law.

Finally, even if the Oklahoma courts (or this Court) were free to resolve the question of tribal immunity as a matter of policy, this case suggests no persuasive reason to depart from the traditional rule. A sovereign's immunity from suit for money damages neither leaves potential commercial counterparties unable to protect their interests, nor interferes with the sovereign's ability to manage its commercial affairs. The rule of immunity does, however, at least partially protect the public represented by a sovereign—including the members of an Indian Tribe—from liability for the negligence, malfeasance, or naivete of its agents. The few facts disclosed by the record in this case are consistent with those general policy observations; and we see no reason to assume that recognition of petitioner's sovereign immunity from suit will cause unfairness to respondent, rather than preventing an equivalent unfairness to the Tribe.

ARGUMENT

THE TRIBAL SOVEREIGN IMMUNITY RECOGNIZED BY FEDERAL LAW PRECLUDES ANY SUIT AGAINST AN INDIAN TRIBE IN THE ABSENCE OF CONSENT BY THE TRIBE OR AUTHORIZATION BY CONGRESS

In rejecting petitioner's sovereign immunity defense to this action, the Oklahoma Court of Appeals relied on the Oklahoma Supreme Court's decisions in *Hoover* v. *Kiowa Tribe of Oklahoma*, 909 P.2d 59, 62 (1995), cert. denied, 116

S. Ct. 1675 (1996), and *First National Bank in Altus* v. *Kiowa, Comanche & Apache Intertribal Land Use Committee*, 913 P.2d 299, 300 (1996). Those decisions did not question that Indian Tribes are entitled to sovereign immunity from suit in certain circumstances, but they held that tribal sovereign immunity does not bar a suit in state court to enforce "a contract between an Indian tribe and a non-Indian * * * when the contract is executed outside of Indian Country." *Hoover*, 909 P.2d at 62. That conclusion is incorrect as a matter of federal law.

A. Indian Tribes Are Neither States Nor Foreign Nations, But "Domestic Dependent Nations"

The Indian Tribes of the United States are a direct continuation of "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 851 (1985). Their original sovereign character therefore predates that of the original States, which themselves grew out of the separate "self-governing political communities" established by European settlers when they arrived on these shores. In their early relations, the European colonies, and their sponsoring governments, although they asserted "title" to the new continent as against all other Europeans by right of "discovery" (*Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-574 (1823)), nonetheless recognized the native communities that they encountered as independent powers—"formidable enemies, or effective friends." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 546 (1832); see *Johnson*, 21 U.S. at 590. Relations with the various Tribes were conducted by governments, and embodied in treaties. See, *e.g.*, *Worcester*, 31 U.S. at 542-548; *Johnson*, 21 U.S. at 600-604; F. Cohen, *Handbook of Federal Indian Law* 46-47 (1942).

The advent of colonial independence "found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe." *Worcester*, 31 U.S. at 558. The practice of dealing with the Tribes as separate powers continued under the first government of the United States, but with considerable confusion of authority as between the national government and those of the individual States. Article IX of the Articles of Confederation conferred on Congress "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians," but only with respect to those Indians who were "not members of any of the States," and further "provided that the legislative right of any State within its own limits be not infringed or violated."[2] Under the power that was granted, and the treaty power also granted to Congress by Article IX, the national government entered into treaties with several Tribes. See *Worcester*, 31 U.S. at 548-554; Cohen, *Handbook* 47-49.

The division of responsibility for Indian affairs between state and national governments under the Articles of Confederation proved, according to James Madison, a source of "frequent perplexity and contention in the federal councils":

> [H]ow the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The Federalist No. 42, at 269 (Madison) (C. Rossiter ed., 1961). New York, for example, made separate treaties with

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[2] Article VI also recognized the right of an individual State to take up arms if it "received certain advice of a resolution being formed by some nation of Indians to invade such State."

some Tribes (see *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 231 (1985)); and "[t]he ambiguous phrases which follow[ed] the grant of power to the United States [in the Articles], were so construed by the states of North Carolina and Georgia as to annul the power itself," leading to "discontents and confusion" (*Worcester*, 31 U.S. at 559)). The question of state relations with the Indian Tribes was therefore much on the minds of delegates to the Constitutional Convention of 1787. It was resolved by ceding to the national government not only all power to make treaties (see Art. I, § 10; Art. II, § 2, Cl. 2), but also all power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Art. I, § 8, Cl. 3). See *Worcester*, 31 U.S. at 559; *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with the Indian tribes."); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida*, 470 U.S. at 234.

For some 80 years after the adoption of the Constitution, the United States continued to conduct relations with Indian Tribes through a combination of negotiated treaties and armed force. See generally, *e.g.*, Cohen, *Handbook* 49-66.[3] In 1871 Congress, while affirming the continued validity of previous treaties, declared that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the

[3] The last treaty negotiated with petitioner, in 1867, was designed in part to conclude peace with Tribes, including petitioner, that had joined the Sioux in hostilities against the United States. Cohen, *Handbook* 65.

United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566, codified at 25 U.S.C. 71. For years thereafter, the United States dealt with the Tribes by way of agreements that "differed from formal treaties only in that they were ratified by both houses of Congress instead of by the Senate alone." Cohen, *Handbook* 67. After a period during which national policy favored allotting tribal lands to individual Indians and making unallotted lands available for non-Indian settlement, with a view to the eventual termination of the reservation system, Congress ultimately adopted a new approach, and new statutes, designed to foster tribal economic and political self-determination, within the limits of full participation as a unique but integral part of the modern United States. See generally *id.* at 83-87, 206-217; *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976); *Mancari*, 417 U.S. at 552-555.

This brief reminder of a long history suggests the underpinnings of a point made repeatedly in this Court's cases: Indian Tribes have a unique place in this Nation's history and, consequently, in its laws. See, *e.g.*, *National Farmers Union Ins. Co.*, 471 U.S. at 851; *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); *Mancari*, 417 U.S. at 551-553; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886); *Ex parte Crow Dog*, 109 U.S. 556, 568-570 (1883). Self-governing societies in original enjoyment of large portions of this continent, the Tribes were, from the beginning of European settlement, commonly recognized as separate "states" or "nations" (see *Worcester*, 31 U.S. at 561; *Cherokee Nation*, 30 U.S. at 16). As the European colonies themselves grew into States and then into a Nation, however, they asserted first an exclusive right to deal with the Tribes, and ultimately a claim to complete territorial dominion over

what is now the United States. See generally *Kagama*, 118 U.S. at 381; *Johnson*, *supra*. By treaty where possible, by force of arms where it was thought necessary, the Tribes were brought under the dominant sovereignty of the new national government, so that what was plainly "Indian territory" was nonetheless also considered to lie "within the jurisdictional limits of the United States." *Cherokee Nation*, 30 U.S. at 17; see *Johnson*, 21 U.S. at 588 ("Conquest gives a title which the Courts of the conqueror cannot deny."). Because the Tribes "occup[ied] a territory to which we assert[ed] a title independent of their will," they could not be considered foreign nations—"not * * * because a tribe may not be a nation, but because it is not foreign to the United States." *Cherokee Nation*, 30 U.S. at 17, 19. Nor, however, was their original sovereignty destroyed by virtue of their coming under the dominant sovereignty and protection of the United States. See *Worcester*, 31 U.S. at 560-561. Instead they became, in Chief Justice Marshall's precisely descriptive phrase (*Cherokee Nation*, 30 U.S. at 17), "domestic dependent nations."

B. The Scope Of Tribal Sovereign Immunity Is Governed By Federal Law

In *Aircraft Equipment Co.* v. *Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (1996), the Oklahoma Supreme Court characterized the issue of tribal sovereign immunity as "a state law question." That is incorrect.

As we have discussed, the Constitution granted the United States sole power to regulate relations with the Tribes, in conscious response to problems caused by the previous division of authority between the national government and the States. Neither the Tribes nor their members were represented at the Constitutional Convention: The Tribes ceded none of their sovereignty there,

and their people conferred none on the new government of the United States. See *Idaho* v. *Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2034 (1997); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782 (1991). The creation of a strong national government with exclusive responsibility for Indian relations did, however, directly affect the Tribes during the ensuing 150 years of this Nation's consolidation and expansion.

It was the United States—not any individual State—with which the Tribes negotiated; with which from time to time they fought; with which they concluded treaties of peace, friendship and protection; and the dominant sovereignty of which they were ultimately persuaded or constrained to accept. Because that dominant sovereignty is different in origin from the sovereignty exercised by the federal government with respect to the States, it is also different in kind and extent. All remaining rights of tribal sovereignty and self-government, unlike the similar rights enjoyed by the people of the States as such, are "ultimately dependent on and subject to the broad power of Congress." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980); see also *United States Fidelity & Guaranty Co.*, 309 U.S. at 512 ("It is as though the immunity which was [the Tribes'] as sovereigns passed to the United States for their benefit, as their tribal properties did.").

At the same time it was the United States, rather than any individual State, that assumed, by the assertion of ultimate sovereignty over the Tribes, concomitant responsibilities to them and to their members. This Court has long held that the Tribes' "relation to the United States resembles that of a ward to his guardian" (*Cherokee Nation*, 30 U.S. at 17)); and Congress has recently reiterated that "through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a

unique trust responsibility to protect and support Indian tribes and Indian people." Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(3), 110 Stat. 4017, to be codified at 25 U.S.C. 4101(3). Compare *Kagama*, 118 U.S. at 383-384 ("These Indian tribes *are* the wards of the nation. * * * They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."); see also, *e.g.*, *Mancari*, 417 U.S. at 552; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568 (1903). The United States has, therefore, not only plenary power over the field of Indian affairs, but a special responsibility to the Tribes and their members.

Federal law did not create tribal sovereignty, which predates the Constitution. See, *e.g.*, *Wheeler*, 435 U.S. at 322-330; *id.* at 328 ("none of these [federal] laws *created* the Indians' power to govern themselves"). It was not judicial decisions that originated a doctrine of tribal sovereignty, which might then be subject to modification by the courts, state or federal, in light of the passage of time or changes in circumstance. Instead, the Court has consistently recognized that the Tribes' sovereignty stems directly from their aboriginal possession and occupancy, as self-governing political communities, of territory that has since been incorporated into the United States. See, *e.g.*, *id.* at 322-323; *Worcester*, 31 U.S. at 558-561. The Constitution carried forward that fundamental understanding of the sovereign status of the Tribes, and it presumes the continuation of that sovereignty. See *Wheeler*, *supra* (applying doctrine of "dual sovereignty" to permit successive federal and tribal prosecutions); compare *Coeur d'Alene*, 117 S. Ct. at 2033-2034 (the Eleventh Amendment reflects a "broader concept of [sovereign] immunity, implicit in the Constitution"); *Seminole Tribe* v.

Florida, 116 S. Ct. 1114, 1122 (1996) (same); *Blatchford*, 501 U.S. at 779. The sovereignty of Tribes is therefore no less a first principle than the sovereignty of the States, or of the United States; and although subject to the plenary authority of Congress, it is not subject to judicial defeasance.

With the adoption of the Constitution the Tribes became subject, as we have described, to the dominant sovereignty of the United States. But decisions involving the assertion of that dominance, in derogation of the Tribes' preexisting sovereignty, rest with the political Branches of the national government. See, *e.g.*, *Lone Wolf*, 187 U.S. at 565, 568 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."). All questions concerning the extent and nature of tribal sovereignty are therefore questions of federal law; but the fundamental rule to be applied by the courts—state or federal—is that tribal sovereignty retains its full vitality except to the extent that it has been divested through the national political process. See *Wheeler*, 435 U.S. at 323; *Washington* v. *Confederated Tribes*, 447 U.S. 134, 153-154 (1980) (sovereignty may be divested where inconsistent with overriding national interests, but "it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"); compare *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

C. Federal Law Precludes A Suit For Money Damages Against An Unconsenting Tribe

In *Oklahoma Tax Commission* v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), this

Court reaffirmed that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." That statement reflects longstanding precedent. See, *e.g.*, *Coeur d'Alene*, 117 S. Ct. at 2034 ("the plan of the convention did not surrender Indian tribes' immunity for the benefit of the States"); *Blatchford*, 501 U.S. at 782 ("We have repeatedly held that Indian tribes enjoy immunity against suits by States."); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *Three Affiliated Tribes* v. *Wold Eng'g*, 476 U.S. 877, 890-891 (1986) ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977); *United States Fidelity & Guaranty Co.*, 309 U.S. at 512-515; *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895). The Oklahoma Supreme Court's holding that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country" (*Hoover*, 909 P.2d at 62) is incompatible with that established principle of federal law.

1. ***Sovereign immunity bars suits based on a Tribe's dealings with nonmembers***

Potawatomi makes clear that tribal sovereign immunity bars an action for monetary relief, even if the action is based on a Tribe's commercial dealings with nonmembers. In that case, Oklahoma sought to recover $2.7 million from the Citizen Band Potawatomi Indian Tribe for taxes on cigarettes sold to nonmembers by a store owned and operated by the Tribe. See 498 U.S. at 507. This Court held that the Tribe was obligated to collect

state taxes on future cigarette sales to nonmembers, but that tribal sovereign immunity barred a money judgment against the Tribe for unpaid taxes on past sales. *Id.* at 509-511, 514.

The Court specifically refused Oklahoma's invitation "to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity." 498 U.S. at 510. The State argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense," and that the doctrine therefore "should be limited to the tribal courts and the internal affairs of tribal government." *Ibid.*[4] In rejecting that argument, the Court observed that Congress "has always been at liberty to dispense with * * * tribal immunity or to limit it," and "has occasionally authorized limited classes of suits against Indian tribes," but that it "has never authorized suits to enforce tax assessments," and "has consistently reiterated its approval of the immunity doctrine." *Ibid.* The Court concluded that, although the State might have alternative methods of collecting the taxes at issue, there was "no doubt that sovereign immunity bar[red] the State from pursuing the most efficient remedy" by bringing suit directly against the Tribe. *Id.* at 514.

As the Court noted in *Potawatomi*, "Congress has consistently reiterated its approval of the immunity doctrine," which is consistent with "Congress' desire to promote the goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." 498 U.S. at 510 (internal quotation marks omitted), citing the Indian Financing Act

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[4] Compare *Hoover*, 909 P.2d at 62 ("Only that litigation which * * * infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance."); *Aircraft Equip. Co.*, 921 P.2d at 362 (discussing commercial context).

of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act (ISEAA), 25 U.S.C. 450 *et seq.*; see 25 U.S.C. 450n (nothing in ISEAA, which establishes a framework of financial assistance for Tribes, is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"). Moreover, while "Congress has occasionally authorized limited classes of suits against Indian tribes" (*Potawatomi*, 498 U.S. at 510), respondent has not alleged that any such provision is applicable to this case.[5] The absence of any such authorization reinforces the conclusion that tribal governments remain protected by the established rule of sovereign immunity. While certain tribal entities specially chartered to engage in commercial activities may be subject to suit in some cases, the promissory note on which respondent sued was signed in the name of the Tribe itself, and it specifically reserved the Tribe's "sovereign rights." J.A. 14, 67-68.[6]

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[5] Compare 25 U.S.C. 450f(c)(3) (providing for limited waivers by insurers in the context, and to the extent, of federally mandated liability insurance); 25 U.S.C. 2710(d)(7)(A)(ii) (authorizing suits by States in federal court to enjoin certain gaming activity on tribal lands); *United States Fidelity & Guaranty Co.*, 309 U.S. at 509, 513 (special statutory authorization for cross-claims); *Green* v. *Menominee Tribe*, 233 U.S. 558 (1914) (special jurisdictional statute for adjudication of claims by Indian traders); *United States* v. *Gorham*, 165 U.S. 316 (1897) (discussing Indian Depredation Act of 1891); *Thebo*, 66 F. at 373-374 & n.1.

[6] In the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, Congress authorized most Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C. 476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). The principal reason for Section 17 of the IRA was a concern that non-Indian entities would not enter into commercial dealings with a tribal government because of its immunities. 65 Interior Dec. 483, 484 (1958); R. Strickland et al., *Felix Cohen's Handbook of Federal Indian Law* 325-326 (1982) (*1982 Cohen*). The Oklahoma Indian Welfare Act (OIWA), ch. 831, § 3, 49 Stat. 1967 (1936), authorizes Oklahoma Tribes, such as petitioner, to adopt constitutions and to receive corporate charters equivalent to those issued under the IRA. 25 U.S.C. 503. Charters of incorporation issued under Section 17 of the IRA often contain a clause expressly allowing the corporation to sue or be sued. Similarly, the OIWA authorizes any ten or more individual Oklahoma Indians to form a cooperative association chartered by the Secretary of the Interior, and the Act expressly provides that such an association "may sue and be sued" in state or federal court. 25 U.S.C. 504, 505. Some courts have construed "sue or be sued" clauses in IRA charters to waive the immunity of the incorporated entity from suit. See, *e.g.*, *Weeks Constr., Inc.* v. *Oglala Sioux Housing Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). Any such waiver is limited, however, to the business dealings and assets of that corporation, and does not extend to the Tribe in its sovereign capacity. *1982 Cohen* at 325-326; see, *e.g.*, *Seneca-Cayuga Tribe* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Constr. Co.* v. *Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982).

Nothing that has occurred since the decision in *Potawatomi* calls its reasoning into question. To the contrary, in 1993 Congress enacted the Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*, which again recognizes the "inherent sovereignty of Indian tribes" and confirms Congress's understanding that the United States has a "trust responsibility" that generally includes "the protection of the sovereignty of each tribal government." 25 U.S.C. 3601; see also 25 U.S.C. 479a note (congressional findings). Congress has recently considered, but to date has not enacted, proposals specifically designed to abrogate, or to require the waiver of, tribal sovereign immunity under certain circumstances. See, *e.g.*, S. Rep. No. 56, 105th Cong., 1st Sess. 63-64 (1997) (discussing Section 120 of the Department of the Interior and Related Agencies Appropriations Bill, 1998, H.R. 2107, as reported to the Senate, with amendments, by the Senate Committee

on Appropriations); *Tribal Sovereign Immunity: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 2d Sess. (1996). Congress is the appropriate forum for the consideration and disposition of such proposals, because it has both the constitutional authority and the institutional competence, as a deliberative national legislative and policy-making body, to consider and reconcile the rights and interests of States, Tribes, and individual citizens.[7]

2. *Sovereign immunity bars suits against a Tribe based on conduct that occurred outside Indian country*

The rule of sovereign immunity is not rendered inapplicable in this case simply because the contract at issue was evidently negotiated, and the relevant documents were allegedly signed, within the State's territorial jurisdiction and not on land held by or for the Tribe or its members. Compare *Hoover*, 909 P.2d at 62 (Tribe may be sued on contract "executed outside of Indian Country"). This Court has previously refused to draw just such a distinction. In *Puyallup Tribe, Inc.* v. *Department of Game*, a Tribe challenged a state court's judgment that asserted

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[7] Practical and policy considerations have led many sovereigns, including the United States, to waive their immunity from suit under some circumstances. See, *e.g.*, page 27, *infra*; 28 U.S.C. 1346, 1491, 2674. On the other hand, Congress's consistent support for tribal immunity has been predicated in part on its "desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotation marks omitted). Those goals could be seriously compromised—and the federal fisc additionally burdened—by exposing Tribes to the burdens of litigation and the enforcement of money judgments against tribal treasuries, including the seizure of tribal tax revenues. See *Aircraft Equip. Co.*, *supra*. Only Congress is in a position to reconcile such legitimate but conflicting policy concerns.

"jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation." 433 U.S. at 167. This Court held that a claim of sovereign immunity was "well founded" to the extent that it was "advanced on behalf of the Tribe, rather than the individual [Indian] defendants." *Id.* at 167-168; see *id.* at 172-173. Accordingly, the Court held that "the portions of the state-court order that involve[d] relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 173. In reaching that conclusion, the Court did not distinguish the Tribe's activities on reservation land from those occurring elsewhere, observing simply that "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* at 172.

The Oklahoma Supreme Court relied on cases such as *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). See *Hoover*, 909 P.2d at 61 (quoting *Mescalero* and *Kake*); *Aircraft Equip. Co.*, 921 P.2d at 361-362 & n.2 (same). Those cases hold that a State may have authority to tax or regulate the activities of Tribes or individual Indians who engage in conduct (such as operating a ski resort, as in *Mescalero*, or fishing, as in *Kake*) within the State but outside Indian country. As *Potawatomi* makes clear (see 498 U.S. at 512-514), however, there is a difference between the right to demand compliance with state law and the means that may be available to enforce such compliance. In that respect an immune Tribe is no different from a State, which may be subject to certain legal obligations, yet not subject to a suit directly against the State to enforce them; or a foreign sovereign, which has no "right" to engage in commercial activity within a State without complying with that State's valid regulations, but which nonetheless may be sued by a private party for violating

those regulations only if and as permitted by federal law. See, *e.g.*, *id.* at 514; *Ex parte Young*, 209 U.S. 123 (1907); *In re Ayers*, 123 U.S. 443, 506-507 (1887); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. at 486-489, 493.[8] Neither *Mescalero* nor *Kake* discusses enforcement, or mentions tribal immunity from suit.[9] This Court's later decisions in *Potawatomi* and *Puyallup* do address those issues, and they hold that neither a valid state tax nor a valid state fishing regulation may be enforced in a suit brought directly against an affected Tribe.

3. *State recognition of tribal sovereign immunity is not a matter of comity under state law*

In rejecting the sovereign immunity defense advanced in *Hoover*, the Oklahoma Supreme Court relied in part

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[8] Similarly, it is important to note that the issue of a Tribe's sovereign immunity from suit is quite different from the issue of a Tribe's or State's general regulatory or adjudicatory jurisdiction, which like that of any sovereign, is more closely tied to considerations of citizenship and territory. Compare, *e.g.*, *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404, 1409-1410, 1413-1416 (1997). The Oklahoma Supreme Court appears to have confused the two concepts, applying to tribal immunity (which is absolute in the absence of explicit tribal or congressional consent) a facts-and-circumstances test that seems to be taken from the general jurisdictional context. Compare *Hoover*, 909 P.2d at 61, citing *Lewis* v. *Sac & Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503, 508 (Okla. 1994) ("Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance."), cert. denied, 116 S. Ct. 476 (1995), with *Strate*, 117 S. Ct. at 1416 ("Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'").

[9] We also note that in both *Mescalero* (see 411 U.S. at 146-147) and *Kake* (see 369 U.S. at 62) it was a Tribe itself that had brought suit, thus submitting to the jurisdiction of the court to decide the question presented. Compare *Three Affiliated Tribes*, 476 U.S. at 891.

on this Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), for the proposition that a Tribe's sovereign immunity from suit in state court, like the immunity of a sister State, could be decided by the state courts "solely [as] a matter of comity." *Hoover*, 909 P.2d at 61-62, quoting *Padilla* v. *Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989). That analogy between States and Tribes is a false one.

Hall sustained the California courts' exercise of jurisdiction over the State of Nevada, based on tortious conduct by a Nevada agent within California. The Court noted that, in the absence of other federal law, any restriction on California's judicial power to entertain the claim at issue would have to be found in the federal Constitution. See 440 U.S. at 414 & n.5; see also *id.* at 430 (Blackmun, J., dissenting). The Court observed, however, that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-419. Finding no evidence that the Constitution was intended to strip the States of their preexisting sovereign prerogative to exercise (or to refrain from exercising) their "exclusive territorial jurisdiction over visiting sovereigns" (*id.* at 417; see *id.* at 416-418 & n.13), the Court held that the Constitution generally leaves each State free to decide, as a matter of policy and comity, whether and on what terms to accord its sister States immunity from suit in its own courts. *Id.* at 418-427.

Hall is inapposite here. While the framers of the Constitution may not have adverted to the possibility of suits against one State in the courts of another (see *Hall*, 440 U.S. at 418-419), they were, as we have explained (see pages 9-10, *supra*), specifically concerned about the question of relations between the States and the Indian

Tribes. The Constitution addressed that question by vesting the power over Indian affairs—like the analogous power over foreign relations—exclusively in the new national government. *Hall* rests on the premise that the Constitution embodies only certain mutual concessions concerning the States' otherwise sovereign relations among themselves; but one of those concessions was each State's renunciation, in favor of the new national government, of any power to carry on independent sovereign relations with the Indian Tribes.[10] Thus, as we have described (see pages 12-15, *supra*), the question of tribal sovereignty is governed by a comprehensive body of federal law that binds both petitioner and the State of Oklahoma. A State is not free to decide whether or not it will respect a Tribe's immunity, because the degree of comity due the Tribes is a matter of national, not state, policy; and the policymakers are Congress and the President, not the state (or federal) courts.

Indeed, with respect to tribal sovereign immunity from suit in state court, a more appropriate analogy than the immunity of a sister State is the immunity of a foreign Nation. See *Coeur d'Alene*, 117 S. Ct. at 2034 (with respect to the States' sovereign immunity from suit, "Indian tribes * * * should be accorded the same status as foreign sovereigns"). That question, too, for similar constitutional and structural reasons, is one of federal law, to be determined by the political Branches in the exercise of their plenary power over foreign affairs. *Verlinden*, 461 U.S. at 486. For many years, under the rule of "grace and

[10] Thus, while Article I, Section 8, Clause 3 of the Constitution grants Congress the power to regulate commerce "*among* the several States," in the same breath it confers the power to regulate the entire Nation's commerce both "*with* foreign Nations" and "*with* the Indian Tribes." Cf. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153-154 & n.19 (1982).

comity" that traditionally applied among national sovereigns, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Ibid.*; see also *Hall*, 440 U.S. at 416-417. Beginning in 1952, the Executive Branch adopted a more restrictive view of foreign sovereign immunity, generally permitting the exercise of jurisdiction in suits arising out of a foreign sovereign's purely commercial activities. That position of the Executive was then binding upon the courts under the principle that "[i]t is * * * not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). In 1976, Congress largely codified that approach in the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq*. Significantly, however, the courts did not take it upon themselves to abrogate the sovereign immunity of foreign governments in particular circumstances. That step was left to the political Branches, as the Constitution required.

In the exercise of the plenary power over Indian affairs similarly committed to it by the Constitution, the national government could, if it chose, render Tribes like petitioner amenable to suit in state court on commercial contracts signed outside the Tribe's own territorial jurisdiction. Congress has not adopted any such policy, however; and in the absence of such a national political decision, the courts of the States may not invoke their own notions of comity as a justification for asserting jurisdiction over Tribes in derogation of the rule of tribal sovereign immunity recognized by federal law. Cf. *Three Affiliated Tribes*, 476 U.S. at 892-893; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423-427 (1964).

D. Policy Considerations Support The Continued Recognition Of Tribal Sovereign Immunity In Cases Involving Commercial Contracts

The Oklahoma Supreme Court identified "important public policy considerations" that it believed supported its jurisdictional reasoning. *Aircraft Equip. Co.*, 921 P.2d at 362. Noting that "[c]ontracts are effective when parties know that the provisions of the contract will be enforced," the court observed that enforcement "protects all of our citizens including the tribes who voluntarily choose to do business with their fellow Oklahoma citizens." *Ibid.* In the court's view, "the tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations." *Ibid.* Thus, the court concluded, to honor the Tribe's immunity from suit would "chill tribal commercial and entrepreneurial business." *Ibid.*

As we have explained, the question whether the policy considerations identified by the Oklahoma Supreme Court warrant a revision of the present rule of tribal immunity is one for Congress, not the courts of the several States. Even if the Oklahoma courts were free to vary the existing federal immunity rule in exceptional circumstances, however, nothing in the present case could justify such a step. The existence of sovereign immunity does mean that commercial contracts with a sovereign—whether a State, the United States, an Indian Tribe, or a foreign government—may be subject to rules different from those that apply to contracts with private parties. See, *e.g.*, *In re Ayers*, 123 U.S. at 505 (a contract with a State "is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion"); compare *Three Affiliated Tribes*, 476 U.S. at 893. There is, however, nothing unworkable or unfair about the resulting regime.

A sovereign's immunity from suit for money damages does not leave a potential commercial counterparty unable to protect its interests. A seller or buyer of goods or services may, for example, require that the sovereign pay or deliver in advance, or it may raise its prices or lower its bid to compensate for the increased risk of nonperformance. It may insist on escrow, letter-of-credit, or other security arrangements to ensure that a transaction will not be completed until the sovereign has performed its obligations. Or it may simply refuse to deal with a sovereign that will not consent to suit, if it deems the likely gain not worth the risk or inconvenience (as it might, for example, if the sovereign had developed a reputation for failing to honor its obligations).

It is true, as the *Aircraft Equipment* court observed, that the need for such measures may make it more difficult for a tribal sovereign to find willing commercial counterparties, or may, at any rate, increase the Tribe's costs. That is a familiar problem for sovereigns, and there are equally familiar solutions. A sovereign may, for example, establish special commercial entities that are, like private corporations, liable to suit, but only to the extent of their own capital or other resources. See, *e.g.*, note 6, *supra*. It may consent to suits against it in its own courts, in all cases or with whatever conditions and exceptions it deems desirable. See, *e.g.*, 28 U.S.C. 1346, 1491, 2674; *Hoover*, 909 P.2d at 62 (Oklahoma permits suits against itself for breach of contract); Navajo Nat. Code Tit. 1, § 554 (1995); *id.* Tit. 5, § 1567. Or it may consent, in general or with respect to a particular transaction, to waive its immunity and submit to the jurisdiction of another sovereign.[11] We may assume that, in the absence

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[11] See *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), aff'd, 455 U.S. 130 (1982). We are informed that it is not unusual for tribal contracts reviewed by the Department of the Interior

of congressional provision to the contrary or other special circumstances, all these measures are available to Indian Tribes, as they are to other sovereigns.

The existence of tribal sovereign immunity, then, neither interferes with the Tribe's management of its commercial affairs nor imposes any unfair burden on those who transact business with the Tribe.[12] On the other hand, the doctrine does prevent the imposition of monetary liabilities that the Tribe itself has not clearly agreed to bear. As with other sovereigns, therefore, the doctrine at least partially protects the Tribe as sovereign—which is to say, the tribal public, whose collective interest the sovereign represents—from unconsented liability for the negligence, malfeasance, or simple naivete of its agents. See *United States Fidelity & Guaranty Co.*, 309 U.S. at 513 ("It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials."). Moreover, while the basic rule of tribal immunity may, in the absence of some contrary provision of federal law, be modified through clear, specific, and properly authorized waivers, if the Tribe finds that course necessary or appropriate, the converse is not true: In the absence of the basic rule, the Tribe would have no adequate means to protect itself under circumstances in which it would not advisedly

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to contain specific, limited waiver provisions. Because immunity is such an important attribute of sovereignty, the courts have always scrutinized alleged waivers closely. To be effective, a waiver must be properly authorized by the sovereign itself, not merely by an agent; it must be clear and unequivocal; and its scope will be strictly construed in favor of the sovereign. See, *e.g.*, *Lane* v. *Peña*, 116 S. Ct. 2092, 2096-2097 (1996); *Santa Clara Pueblo*, 436 U.S. at 58-59; *United States Fidelity & Guaranty Co.*, 309 U.S. at 513.

[12] Of course, the doctrine has no impact at all on commercial dealings with individual members of a Tribe.

have consented to liability. Thus, while the recognition of tribal sovereign immunity is a matter of mandatory federal law, not open to modification by the courts on policy grounds, the relevant policy considerations would support the same result.

These general principles comport with what the record below, and the decisions in related cases, reveal about the transaction at issue in this case. A tribal entity agreed to pay respondent $285,000 for stock in Clinton-Sherman Aviation, Inc. (CSA). See page 3, *supra*. In the same transaction, the Tribe agreed to pay Robert Hoover $142,500 for additional shares of CSA. *Hoover*, 909 P.2d at 60. And, in a related transaction, the Tribe agreed to assume a $180,000 debt in order to acquire the assets of Aircraft Equipment Company—although there seems to have been at least some question as to whether that purchase was properly authorized by the Tribe. See *Aircraft Equip. Co.*, 921 P.2d at 360 & n.1.

So far as appears, each of the Tribe's counterparties in these transactions was a commercially sophisticated, Oklahoma-based business or individual, presumably aware of the rule of tribal sovereign immunity. Respondent in this case could not have been unaware of that rule, because the "Waivers and Governing Law" section of the otherwise conventional Promissory Note specifically provides that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." J.A. 14. The record in this case does not indicate whether the Tribe's obligation on the Note was secured by the purchased shares; but the Note had a term of only 90 days, and the note at issue in *Hoover*, which was signed as part of the same transaction, was secured by CSA shares, on which Hoover foreclosed when the Tribe failed to make payment. 909 P.2d at 60 & n.3.

It is impossible, on the present record, to draw any firm conclusion about the actual business agreement that underlies this case. We review the few known facts only to suggest that there is no basis for concluding that recognition of the Tribe's sovereign immunity will be at all unjust to respondent. A no-cash transaction, with the seller's recourse explicitly limited to repossession of the property sold (rather than a suit for the full stated purchase price), would, for example, be an efficient way to arrange the sale of an asset of highly uncertain value, the seller thereby retaining some or all of the risk of overvaluation during the period in which the buyer agrees to make payment. If that was the business agreement here, then respondent, understanding the Tribe's immunity from money damages, bargained only for the retention or repossession of its shares in the event of non-payment. Any cash recovery on the Note would, on that assumption, represent an unnegotiated windfall to respondent. Particularly given the likely relative commercial sophistication of the parties, and the fact that, by the time of the foreclosure sale in *Hoover*, the shares of CSA were worthless (see 909 P.2d at 60 n.3), we see no reason to assume that proper recognition of petitioner's sovereign immunity from suit will cause unfairness to respondent, rather than preventing an equivalent unfairness to the Tribe.

CONCLUSION

The judgment of the Oklahoma Court of Appeals should be reversed.

Respectfully submitted.

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